STATEMENT FOR THE RECORD
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LEGISLATIVE HEARING ON H.R. 5388,
THE "DISTRICT OF COLUMBIA FAIR AND EQUAL HOUSE VOTING RIGHTS ACT OF 2006"

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SUBCOMMITTEE ON THE CONSTITUTION
COMMITTEE ON THE JUDICIARY
THE UNITED STATES HOUSE OF REPRESENTATIVES

I.
INTRODUCTION

Chairman Chabot, Ranking Member Nadler, members of the Subcommittee, it is an honor to appear before you today to discuss the important question of the representational status of the District of Columbia in Congress. I expect that everyone here today would agree that the current non-voting status of the District is fundamentally at odds with the principles and traditions of our constitutional system. As Justice Black stated in *Wesberry v. Sanders*:[1] "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."

Today, we are all seeking a way to address the glaring denial of basic rights to the citizens of our Capitol City. Yet, unlike many issues before Congress, there has always been a disagreement about the means rather than the ends of full representation for the District residents. Regrettably, I believe that H.R. 5388 is the wrong means.[2] Despite the best of motivations, the bill is fundamentally flawed on a constitutional level and would only serve to needlessly delay true reform for District residents. Indeed, considerable expense would likely come from an inevitable and likely successful legal challenge -- all for a bill that would ultimately achieve only partial representational status. It is the equivalent of allowing Rosa Parks to move halfway to the front of the bus in the name of progress. District residents deserve full representation and, while this bill would not offer such reform, there are alternatives, including a three-phased proposal that I have advocated in the past.[3]

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[1] 376 U.S. 1, 17-18 (1964).

[2] *See* Jonathan Turley, *Right Goal, Wrong Means*, Wash. Post, Dec. 12, 2004, at 8.

[3] While I am a former resident of Washington, I come to this debate with primarily academic and litigation perspectives. In addition to teaching at George Washington Law School, I was counsel in the successful challenge to the Elizabeth Morgan Act. Much like this bill, a hearing was held to address whether Congress had the authority to enact the law -- the intervention into a single family custody dispute. I testified at that hearing as a neutral constitutional expert and strongly encouraged the members not to

I must respectfully but strongly disagree with the constitutional analysis offered to Congress by Professor Viet Dinh[4] and the Hon. Kenneth Starr.[5] Frankly, these interpretations are based on uncharacteristically liberal interpretations of the text of Article I, which clearly limits voting members in Congress to representatives of the various "states." I also believe that the concurrent awarding of an at-large congressional seat to Utah raises difficult legal questions, including but not limited to the guarantee of "one person, one vote." I will address each of these arguments below. However, in the hope of a more productive course, I will also briefly explore an alternative approach that would be (in my view) both unassailable on a legal basis and more practicable on a political basis.

II.
THE ORIGINAL PURPOSE AND DIMINISHING NECESSITY OF A FEDERAL ENCLAVE IN THE 21ST CENTURY

The non-voting status of District residents remains something of a historical anomaly that should be a great embarrassment for all members of Congress and all citizens. Indeed, with the passage of time, there remains little necessity for a separate enclave beyond the symbolic value of

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move forward on the legislation, which I viewed as a rare example of a "Bill of Attainder" under Section 9-10 of Article I. I later agreed to represent Dr. Eric Foretich on a pro bono basis to challenge the Act, which was struck down as a Bill of Attainder by the Court of Appeals for the District of Columbia. *Foretich v. United States*, 351 F.3d 1198 (D.C. Cir. 2003). The current bill is another example of Congress exceeding its authority, though now under sections 2 and 8 (rather than section 9 and 10) of Article I.

[4] This analysis was co-authored by Mr. Adam Charnes, an attorney with the law firm of Kilpatrick Stockton LLP. Viet Dinh and Adam Charnes, "The Authority of Congress to Enact Legislation to Provide the District of Columbia with Voting Representation in the House of Representatives," Nov. 2004 found at http://www.dcvote.org/pdfs/congress/vietdinh112004.pdf. This analysis was also supported recently by the American Bar Association in a June 16, 2006 letter to Chairman James Sensenbrenner.

[5] Testimony of the Hon. Kenneth W. Starr, House Government Reform Committee, June 23, 2004.

"belonging" to no individual state. To understand Article I, Section 8, one has to consider the events that led to the first call for a separate federal district.

A. The Original Purposes Behind the Establishment of a Federal Enclave.

On January 1, 1783, Congress was meeting in Philadelphia when they were surprised by a mob of Revolutionary War veterans demanding their long-overdue back pay. It was a period of great discontentment with Congress and the public of Pennsylvania was more likely to help the mob than to help suppress it. Indeed, when Congress called on the state officials to call out the militia, they refused. Congress was forced to flee, first to Princeton, N.J., then to Annapolis and ultimately to New York City.[6]

When the framers gathered again in Philadelphia in the summer of 1787 to draft a new constitution, the flight from that city five years before was still prominent in their minds. Madison and others called for the creation of a federal enclave or district as the seat of the federal government – independent of any state and protected by federal authority. Only then, Madison noted, could they avoid "public authority [being] insulted and its proceedings . . . interrupted, with impunity."[7] Madison believed that the physical control of the Capitol would allow direct control of proceedings or act like a Damocles' Sword dangling over the heads of members of other states: "How could the general government be guarded from the undue influence of particular states, or from insults, without such exclusive power? If it were at the pleasure of a particular state to control the sessions and deliberations of Congress, would they be secure from insults, or the influence of such a state?"[8] James Iredell raised the same point in the North Carolina ratification convention when he asked "Do we not all remember

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[6] Turley, *supra*, at 8.

[7] The Federalist No. 43, at 289 (James Madison) (James E. Cooke ed., 1961).

[8] 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787 433 (Madison, J) (Jonathan Elliot ed., 2d ed. 1907).

that, in the year 1783, a band of soldiers went and insulted Congress?"[9] By creating a special area free of state control, "[i]t is to be hoped that such a disgraceful scene will never happen again; but that, for the future, the national government will be able to protect itself."[10]

In addition to the desire to be free of the transient support of an individual state, the framers advanced a number of other reasons for creating this special enclave.[11] There was a fear that a state (and its representatives in Congress) would have too much influence over Congress, by creating "a dependence of the members of the general government."[12] There was also a fear that symbolically the honor given to one state would create in "the national councils an imputation of awe and influence, equally dishonorable to the Government and dissatisfactory to the other members of the confederacy."[13] There was also a view that the host state would benefit too much from "[t]he gradual accumulation of public improvements at the stationary residence of the Government."[14]

The District was, therefore, created for the specific purpose of being a non-State without direct representatives in Congress. The security and operations of the federal enclave would remain the collective responsibilities of the entire Congress – of all of the various states. The Framers, however, intentionally preserved the option to change the dimensions or even relocate

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9 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution, *supra*, reprinted in 3 The Founders' Constitution 225 (Philip B. Kurland & Ralph Lerner eds., 1987).

10 *Id.*

11 The analysis by Dinh and Charnes places great emphasis on the security issue and then concludes that "[d]enying the residents of the District the right to vote in elections for the House of Representatives was neither necessary nor intended by the Framers to achieve this purpose." Dinh & Charnes, *supra*. However, this was not the only purpose motivating the establishment of a federal enclave. Moreover, the general intention was the creation of a non-state under complete congressional authority as a federal enclave. The Framers clearly understood and intended for the District to be represented derivatively by the entire Congress.

12 The Federalist No. 43, at 289 (James Madison) (James E. Cooke ed., 1961).

13 *Id.*

14 *Id.*

the federal district. Indeed, Charles Pinckney wanted that District Clause to read that Congress could "fix and *permanently* establish the seat of the Government . . ."[15] However, the framers rejected the inclusion of the word "permanently" to allow for some flexibility.

While I believe that the intentions and purposes behind the creation of the federal enclave is clear, I do not believe that most of these concerns have continued relevance for legislators. Since the Constitutional Convention, courts have recognized that federal, not state, jurisdiction governs federal lands. As the Court stressed in *Hancock v. Train*, 426 U.S. 167, 179 (1976), "because of the fundamental importance of the principles shielding federal installations and activities from regulation by the States, an authorization of state regulation is found only when and to the extent there is 'a clear congressional mandate,' 'specific congressional action' that makes this authorization of state regulation 'clear and unambiguous.'"[16] Moreover, the federal government now has a large security force and is not dependent on the states. Finally, the position of the federal government vis-à-vis the states has flipped with the federal government now the dominant party in this relationship. Thus, even though federal buildings or courthouses are located in the various states, they remain legally and practically separate from state jurisdiction – though enforcement of state criminal laws does occur in such buildings. Just as the United Nations has a special status in New York City and does not bend to the pressure of its host country or city, the federal government does not need a special federal enclave to exercise its independence from individual state governments.

The real motivating purposes of the creation of the federal enclave, therefore, no longer exist. What remains is the symbolic question of having the seat of the federal government on neutral ground. It is a question that should not be dismissed as insignificant. I personally believe that the seat of

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[15] *See generally* Peter Raven-Hansen, *The Constitutionality of D.C. Statehood*, 60 Geo. Wash. L. Rev. 160, 168 (1991) (citing James Madison, The Debates in the Federal Convention of 1787 Which Framed the Constitution of the United States of America 420 (Gaillard Hund & James Brown Scott eds., 1920)).

[16] *See also Hancock v. Train*, 426 U.S. 167, 179 (1976); *Paul v. United States*, 371 U.S. 245, 263 (1963); *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 122 (1954); *California ex rel State Water Resources Control Board v. EPA*, 511 F.2d 963, 968 (9th Cir. 1975).

the federal government should remain completely federal territory as an important symbol of the equality of all states in the governance of the nation. The actual seat of government, however, is a tiny fraction of the actual federal district.

Throughout this history from the first suggestion of a federal district to the retrocession of the Virginia territory, the only options for representation for District residents were viewed as limited to either a constitutional amendment or retrocession of the District itself.[17] Those remain the only two clear options today, though retrocession itself can take any different forms in its actual execution, as will be discussed in Section V.

III.
THE UNCONSTITUTIONALITY OF THE CREATION OF A SEAT IN THE HOUSE FOR THE DISTRICT UNDER ARTICLE I

A. H.R. 5388 Violates Article I of the Constitution in Awarding Voting Rights to the District of Columbia.

As noted above, I believe that the Dinh/Starr analysis is fundamentally flawed and that H.R. 5388 would violate the clear language and meaning of Article I. To evaluate the constitutionality of the legislation, it is useful to follow a classic constitutional interpretation that begins with the text, explores the original meaning of the language, and then considers the implications of the rivaling interpretations for the Constitution system. I believe that this analysis overwhelmingly shows that the creation of a vote in the House of Representatives for the District would do great violence to our constitutional traditions and values. To succeed, it would require the abandonment of traditional interpretative doctrines and could invite future manipulation of one of the most essential and stabilizing components of the Madisonian democracy: the voting rules for the legislative branch.

1. *Textual Analysis.*

Any constitutional analysis necessarily begins with the text of the relevant provision or provisions. In this case, there are two such provisions. The most important textual statement relevant to this debate is found in Article I, Section 2, that

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[17] Efforts to secure voting rights in the courts have failed, *see Adams v. Clinton*, 90 F. Supp. 2d 35, 50 (D.D.C. 2000)).

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch in the States Legislature.[18]

As with the Seventeenth Amendment election of the composition of the Senate,[19] the text clearly limits the House to the membership of representatives of the several states. The second provision is the District Clause found in Article I, Section 8 which gives Congress the power to "exercise exclusive Legislation in all Cases whatsoever, over such District."

On its face, the reference to "the people of the several states" is a clear restriction of the voting membership to actual states. The reference to each state is repeated in the section when the Framers specified that each representative must "when elected, be an inhabitant of that State in which he shall be chosen."

The plain meaning of this section is evidenced in a long line of cases that repeatedly deny the District the status of a state and reaffirm the intention to create a non-state entity. Thus, in *Loughborough v. Blake*,[20] the Court ruled that the lack of representation did not bar the imposition of taxation. Lower courts rejected challenges to the imposition of an unelected local government. The District was created as a unique area controlled by Congress that expressly distinguished it from state entities. This point was amplified by then Judge Scalia of the D.C. Circuit in *United States v. Cohen*, 733 F.2d 128, 140 (D.C. Cir. 1984): the District Clause "enables Congress to do many things in the District of Columbia which it has no authority to do in the 50 states. There has never been any rule of law that Congress must treat people in the District of Columbia exactly as people are treated in the various states."

It has been argued by both Dinh and Starr that the textual clarity in referring to states is immaterial because other provisions with such

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[18] U.S. Const. Art. I, Sec.2.

[19] While not directly relevant to H.R. 5388, the Seventeenth Amendment contains similar language that mandates that the Senate shall be composed of two senators of each state "elected by the people thereof."

[20] 18 U.S. (5 Wheat.) 317, 324 (1820).

references have been interpreted as nevertheless encompassing District residents. This argument is illusory. The major cases extending the meaning of states to the District involved irreconcilable conflicts between a literal meaning of the term state and the inherent rights of all American citizens under the equal protection clause and other provisions. District citizens remains U.S. citizens, even though they are not state citizens. The creation of the federal district removed one right of citizens – voting in Congress – in exchange for the status of being part of the Capitol City. It was never intended to turn residents into non-citizens with no constitutional rights. As the Court stated in 1901:

> The District was made up of portions of two of the original states of the Union, and was not taken out of the Union by cessation. Prior thereto its inhabitants were entitled to all the rights, guaranties, and immunities of the Constitution . . . The Constitution had attached to [the District] irrevocably. There are steps which can never be taken backward . . . . The mere cession of the District of Columbia to the Federal government relinquished the authority of the states, but it did not take it out of the United States or from under the aegis of the Constitution. Neither party had ever consented to that construction of the cession.[21]

The upshot of these opinions is that a literal interpretation of the word "states" would produce facially illogical and unintended consequences. Since residents remain U.S. citizens, they must continue to enjoy those protections accorded to citizens. Otherwise, they could all be enslaved or impaled at the whim of Congress.

Likewise, the Commerce Clause is intended to give Congress the authority to regulate commerce that crosses state borders. While the Clause refers to commerce "among the several states," the Court rejected the notion that it excludes the District as a non-state.[22] The reference to several states was to distinguish the regulated activity from intra-state commerce. As a federal enclave, the District was clearly subsumed within the Commerce Clause.

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21 *O'Donoghue v. United States*, 289 U.S. 516, 540-541 (1933).

22 *Stoutenburgh v. Hennick*, 129 U.S. 141 (1888).

None of these cases means that the term "states" must now be treated as having an entirely fluid and malleable meaning. The courts merely adopted a traditional approach of interpreting these terms in a way to minimize the conflict between provisions and to reflect the clear intent between the various provisions.[23] The District clause was specifically directed at the meaning of a state – it creates a non-state status related to the seat of government and particularly Congress. Non-voting status is directly related and partially defines that special entity. In provisions dealing with such rights as equal protection, the rights extend to all citizens of the United States. The literal interpretation of states in such contexts would defeat the purpose of the provisions and produce a counterintuitive result. Thus, Congress could govern the District without direct representation but it must do so in such a way as not to violate those rights protected in the Constitution:

> Congress may exercise within the District all legislative powers that the legislature of a State might exercise within the State; and may vest and distribute the judicial authority in and among courts and magistrates, and regulate judicial proceedings before them, as it may think fit, *so long as it does not contravene any provision of the Constitution of the United States*.[24]

Supporting the textual interpretation of the District Clause is the fact that Congress had to enact statutes and a constitutional amendment to treat the District as a quasi-state for some purposes. Thus, Congress could enact a law that allowed citizens of the District to maintain diversity suits despite the fact that the Diversity Clause refers to diversity between "states." Diversity jurisdiction is meant to protect citizens from prejudice of being tried in the state courts of another party. The triggering concern is two parties from different jurisdictions. District residents are from a different jurisdiction and the diversity conflict is equally real.

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[23] *See also District of Columbia v. Carter*, 409 U.S. 418, 420 (1973) ("Whether the District of Columbia constitutes a 'State or Territory' within the meaning of any particular statutory or constitutional provision depends upon the character and aim of the specific provision involved.").

[24] *Palmore v. United States*, 411 U.S. 389, 397-398 (1973).

The decision in *National Mutual Ins. Co. v. Tidewater Transfer Co., Inc*,[25] is expressly relied upon in the Dinh/Starr analysis. However, the import of the decision would appear to contradict their conclusions. Only two justices indicated that they would treat the District as a state in their interpretations of the Constitution. The Court began its analysis by stating categorically that the District was not a state and could not be interpreted as being at state under Article III. This point was clearly established in 1805 in *Hepburn v. Ellzey*[26] and was reaffirmed in 1948:

> In referring to the "States" in the fateful instrument which amalgamated them into the "United States," the Founders obviously were not speaking of states in the abstract. They referred to those concrete organized societies which were thereby contributing to the federation by delegating some part of their sovereign powers and to those that should later be organized and admitted to the partnership in the method prescribed. They obviously did not contemplate unorganized and dependent spaces as states. The District of Columbia being nonexistent in any form, much less a state, at the time of the compact, certainly was not taken into the Union of states by it, nor has it since been admitted as a new state is required to be admitted.[27]

However, the Court also ruled that Congress could extend diversity jurisdiction to the District because this was a modest use of Article I authority given the fact that "jurisdictions conferred is limited to controversies of a justiciable nature, the sole feature distinguishing them from countless other controversies handled by the same courts being the fact that one party is a District citizen."[28] Thus, while residents did not have this inherent right as members of a non-state, Congress could include a federal enclave within the jurisdictional category.

The citation of *Geofroy v. Riggs*,[29] by Professor Dinh is equally misplaced. It is true that the Court found that a treaty referring to "states of the Union" included the District of Columbia. However, this interpretation

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25 337 U.S. 582 (1948)
26 6 U.S. (2 Cranch) 445 (1805).
27 *National Mutual Ins.*, 337 U.S. at 588.
28 *Id.* at 592.
29 133 U.S. 258 (1890).

was not based on the U.S. Constitution and its meaning. Rather, the Court relied on meaning commonly given this term under international law:

> It leaves in doubt what is meant by "States of the Union." Ordinarily these terms would be held to apply to those political communities exercising various attributes of sovereignty which compose the United States, as distinguished from the organized municipalities known as Territories and the District of Columbia. And yet separate communities, with an independent local government, are often described as states, though the extent of their political sovereignty be limited by relations to a more general government or to other countries. Halleck on Int. Law, c. 3, §§ 5, 6, 7. The term is used in general jurisprudence and by writers on public law as denoting organized political societies with an established government.[30]

This was an interpretation of a treaty based on the most logical meaning that the signatories would have used for its terminology. It was not, as suggested, an interpretation of the meaning of that term in the U.S. Constitution. Indeed, as shown above, the Court begins by recognizing the more narrow meaning under the Constitution before adopting a more generally understood meaning in the context of international and public law for the purpose of interpretation a treaty.

Finally, Professor Dinh and Mr. Charnes place great importance on the fact that citizens overseas are allowed to vote under the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA).[31] This fact is cited as powerful evidence that "[i]f there is no constitutional bar prohibiting Congress from permitting overseas voters who are not citizens of a state to vote in federal elections, there is no constitutional bar to similar legislation extending the federal franchise to District residents." Again, the comparison between overseas and District citizens is misplaced. While UOCAVA has never been reviewed by the Supreme Court and some legitimate questions still remain about its constitutionality, a couple of courts have found the statute to be constitutional.[32] In the overseas legislation, Congress made a logical choice in treating citizens as continuing to be citizens of the last state in which they resided. This same suggested by Dinh and Charnes was used

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30 *Id.* at 268.

31 Pub. L. 99-410, 100 Stat. 924 (1986), codified at 42 U.S.C. §§ 1973ff et seq. (2003).

32 *See Romeu v. Cohen*, 265 F.3d 118 (2d Cir. 2001); *De La Rosa v. United States*, 842 F. Supp. 607, 611 (D. P. R. 1994).

and rejected in *Attorney General of the Territory of Guam v. United States*.[33] In this case, citizens of Guam argued (as to Dinh and Charnes) that the meaning of state has been interpreted liberally and the Overseas Act relieves any necessity for being the resident of a state for voting in the presidential election. The court categorically rejected the argument and noted that the act was "premised constitutionally on prior residence in a state."[34] The court quoted from the House Report in support of this holding:

> The Committee believes that a U.S. citizen residing outside the United States can remain a citizen of his last State of residence and domicile for purposes of voting in Federal elections under this bill, as long as he has not become a citizen of another State and has not otherwise relinquished his citizenship in such prior State.[35]

Given this logical and limited rationale, the Court held that "[t]he OCVRA does not evidence Congress's ability or intent to permit all voters in Guam elections to vote in presidential elections."[36]

Granting a vote in Congress is not some tinkering of "the mechanics of administering justice in our federation."[37] This would touch upon the constitutionally sacred rules of who can create laws that bind the nation.[38] This is not the first time that Congress has sought to give the District a voting role in the political process that is given textually to the states. When Congress sought to have the District participate in the Electoral College, it passed a constitutional amendment to accomplish that goal – the Twenty-Third Amendment. Likewise, when Congress changed the rules for electing

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33 738 F.2d 1017 (9th Cir. 1984).

34 *Id.* at 1020.

35 *Id.* (citing H.R. Rep. No. 649, 94th Cong., 1st Sess. 7, reprinted in 1975 U.S. Code Cong. & Ad. News 2358, 2364).

36 *Id.*

37 *National Mutual Ins.* at 585.

38 In the past, the District and various territories have been given the right to vote in Committee. However, such committees are merely preparatory to the actual vote on the floor. It is that final vote that is contemplated in the constitutional language. *See Michel v. Anderson*, 14 F.3d 623, 629 (D.C. Cir. 1994) (recognizing the constitutional limitation that would bar Congress from granting votes in the full House).

members of the United States Senate, it did not extend the language to include the District. Rather, it reaffirmed that the voting membership was composed of representatives of the states. These cases and enactments reflect that voting was a defining characteristic of the District and not a matter that can be awarded (or removed) by a simple vote of Congress.

2. *Original and Historical Meaning.*

Despite some suggestions to the contrary, the absence of a vote in Congress was clearly understood as a prominent characteristic of a federal district. During ratification, various leaders objected to the disenfranchisement of the citizens in the district and even suggested amendments that would have addressed the problem. One such amendment was offered by Alexander Hamilton, who wanted the District residents to be able to secure representation in Congress once they grew to a reasonable size.[39] Neither this nor other such amendments offered in states like North Carolina and Pennsylvania were adopted.

This is not to say that the precise conditions of the cessation were clear. Indeed, some states passed Amendments that qualified their votes – amendments which appear to have been simply ignored. Thus, Virginia ratified the Constitution but specifically indicated that some state authority would continue to apply to citizens of the original state from which "Federal Town and its adjacent District" was ceded. Moreover, Congress enacted a law that provided that the laws of Maryland and Virginia "shall be and continue in force"[40] in the District – suggesting that, unless repealed or amended, Maryland continues to have jurisdictional claims in the District.

Whatever ambiguity existed over continuing authority of Maryland or Virginia, the disenfranchisement of citizens from votes in Congress was clearly understood. Indeed, not long after the cessation, a retrocession movement began. Members questioned the need to "keep the people in this degraded situation" and objected to subjecting of American citizens to "laws not made with their own consent." At the time of the ratification, leaders knew and openly discussed the non-voting status of the District in the clearest and strongest possible language:

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[39] 5 The papers of Alexander Hamilton 189 (Harold C. Syrett & Jacob E. Cooke eds., 1962).

[40] Act of Feb. 27, 1801, ch. 15, § 1, 2 stat. 103.

> We have most happily combined the democratic representative with the federal principle in the Union of the States. But the inhabitants of this territory, under the exclusive legislation of Congress, partake of neither the one nor the other. They have not, and they cannot possess a State sovereignty; nor are they in their present situation entitled to elective franchise. They are as much the vassals of Congress as the troops that garrison your forts, and guard your arsenals. They are subjects, not merely because they are not represented in Congress, but also because they have no rights as freemen secured to them by the Constitution.[41]

This debate in 1804 leaves no question as to the original understanding of the status of the District as a non-state without representational status. The federal district was characterized as nothing more than despotic rule "by men . . . not acquainted with the minute and local interests of the place, coming, as they did, from distances of 500 to 1000 miles." Much of this debate followed the same lines of argument that we hear today. While acknowledging that "citizens may not possess full political rights," leaders like John Bacon of Massachusetts noted that they had special status and influence as residents of the Capitol City. Yet, retrocession bills were introduced within a few years of the actual cessation – again prominently citing the lack of any congressional representation as a motivating factor. Indeed, the retrocession of Virginia highlights the original understanding of the status of the District. Virginians contrasted their situation with those residents of Washington. For them, cessation was "an evil hour, [when] they were separated" from their state and stripped of their political voice. Washingtonians, however, were viewed as compensated for their loss of political representation. As a committee noted in 1835, "[o]ur situation is essentially different, and far worse, than that of our neighbors on the northern side of the Potomac. They are citizens of the Metropolis, of a great, and noble Republic, and wherever they go, there clusters about them all those glorious associations, connected with the progress and fame of their country. They are in some measure compensated in the loss of their political rights."[42]

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[41] Mark Richards, Presentation before the Arlington Historical Society, May 9, 2002 (citing Congressional Record, 1805: 910) (quoting Rep. Ebenezer Elmer of New Jersey).

[42] *Id.*

Thus, during this drive for retrocession that began shortly after ratification, District residents appear to have opposed retrocession and accepted the condition as non-voting citizens in Congress for their special status. The result was that Northern Virginia was retroceded, changing the shape of the District from the original diamond shape created by George Washington.[43] The Virginia land was retroceded back to Virginia in 1846. The District residents remained as part of the federal seat of government – independent from participation or representation in any state.

Finally, much is made of the ten-year period during which District residents voted with their original states – before the federal government formally took over control of the District. This, however, was simply a transition period before the District became the federal enclave. It was clearly not the intention of the drafters nor indicative of the status of residents post-federalization. Rather, the exclusion of residents from voting

> was the consequence of the completion of the cessation transaction – which transformed the territory from being part of a state, whose residents were entitled to vote under Article I, to being part of the seat of government, whose residents were not. Although Congress' exercise of jurisdiction over the District through passage of the Organic Act was the last step in that process, it was a step expressly contemplated by the Constitution.[44]

3. *Policy Implications.*
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There are considerable risks and problems with this approach to securing a vote in Congress for the District. First, by adopting a liberal interpretation of the meaning of states in Article I, the Congress would be undermining the very bedrock of our constitutional system. The

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[43] Under the Residence Act of July 16, 1790, Washington was given the task – not surprising given his adoration around the country and his experience as a surveyor. Washington adopted a diamond-shaped area that included his hometown of Alexandria, Virginia. This area included areas that now belong to Alexandria and Arlington. At the time, the area contained to developed municipalities (Georgetown and Alexandria) and to undeveloped municipalities (Hamburg – later known as Funkstown—and Carrollsburg).

[44] *Adams v. Clinton*, 90 F. Supp. 2d 35, 62 (D.D.C. 2000).

membership and division of Congress was carefully defined by the Framers. The legislative branch is the engine of the Madisonian democracy. It is in these two houses that disparate factional disputes are converted into majoritarian compromises – the defining principle of the Madisonian system. By allowing majorities to manipulate the membership rolls, it would add a dangerous instability and uncertainty to the system. The rigidity of the interpretation of states serves to prevent legislative measures to create new forms of voting representatives or shifting voters among states.[45] By taking this approach, the current House could award a vote to District residents and a later majority could take it away. The District residents would continue to vote, not as do other citizens, but at the whim and will of the Congress like some party favor that can be withdrawn with the passing fortunes of politics.

Second, if successful, this legislation would allow any majority in Congress to create other novel seats in the House. This is not the only federal enclave and there is great potential for abuse and mischief in the exercise of such authority. Roughly thirty percent of land in the United States (over 659 million acres) is part of a federal enclave regulated under the same power as the District.[46] The Supreme Court has repeatedly stated that the congressional authority over other federal enclaves derives from the same basic source:[47]

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[45] This latter approach was raised by Judge Leval in *Romeu v. Cohen*, 265 F.3d 118, 128-30 (2d Cir. 2001) when he suggested that Congress would require each state to accept a certain proportion of voters in territories to give them a voice in Congress. This view has been rejected, including in that decision in a concurring opinion that found "no authority in the Constitution for the Congress (even with the states' consent) to enact such a provision." *Id.* at 121 (Walker, Jr., C.J., concurring); *see also Igartua-De La Rosa v. United States*, 417 F.3d 145, 154 n9 (1st Cir. 2005). According to Chief Judge Walker, there are "only two remedies afforded by the Constitution: (1) statehood . . ., or (2) a constitutional amendment." *Id.* at 136.

[46] *See* http://www.gsa.gov/gsa/cm_attachments/GSA_DOCUMENT/GSAFullPAR_111505_Final_R2F-aAB_0Z5RDZ-i34K-pR.pdf

[47] In addition to Article I, Section 8, the Territorial Clause in Article IV. Section 3 states that "[t]he Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

> This brings us to the question whether Congress has power to exercise 'exclusive legislation' over these enclaves within the meaning of Art. I, s 8, cl. 17, of the Constitution, which reads in relevant part: 'The Congress shall have Power * * * To exercise exclusive Legislation in all Cases whatsoever' over the District of Columbia and 'to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.' The power of Congress over federal enclaves that come within the scope of Art. I, s 8, cl. 17, is obviously the same as the power of Congress over the District of Columbia. The cases make clear that the grant of 'exclusive' legislative power to Congress over enclaves that meet the requirements of Art. I, s 8, cl. 17, by its own weight, bars state regulation without specific congressional action.[48]

Congress could use the same claimed authority to award seats of other federal enclaves. Indeed, since these enclaves were not established with the intention of being a special non-state entity, they could claim to be free of some of these countervailing arguments. There are literally millions of people living in these areas, including Puerto Rico (with a population of roughly eight times the size of the District) and the implications for Congress would be considerable.

Third, while the issue of Senate representation is left largely untouched in the Dinh/Starr analysis,[49] there is no obvious principle that

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[48] *Paul v. United States*, 371 U.S. 245, 263-64 (1963).

[49] In a footnote, Dinh and Charnes note that there may be significance in the fact that the Seventeenth Amendment refers to the election of two senators "from each state." Dinh & Charnes, *supra*, at n. 57. They suggest that this somehow creates a more clear barrier to District representatives in the Senate – a matter of obvious concern in that body. The interpretation tries too hard to achieve a limiting outcome, particularly after endorsing an uncharacteristically liberal interpretation of the language of Article I. Article I, Section 2 refers to members elected "by the People of the several states" while the Seventeenth Amendment refers to two senators "from each State" and "elected by the people thereof." Since the object of the Seventeenth Amendment is to specify the number from each state, it is hard

would prevent a majority from expanding its ranks with two new Senate seats for the District. Two Senators and a member of the House would be a considerable level of representation for a non-state with a small population. Yet, this analysis would suggest that such a change could take place without a constitutional amendment.

Finally, H.R. 5388 would only serve to delay true representational status for district residents. On a practical level, this bill would likely extinguish efforts at full representation in both houses. During the pendency of the litigation, it is highly unlikely that additional measures would be considered – delaying reforms by many years. Ultimately, if the legislation is struck down, it would leave the campaign for full representation frozen in political amber for many years.

IV.
THE CONSTITUTIONAL AND STATUTORY PROBLEMS WITH THE CREATION OF AN AT-LARGE SEAT IN UTAH

While most of my attention has been directed at the addition of a voting seat for the District, I would like to briefly address the second seat that would be added to the House. The proposal of awarding an at-large seat to Utah is an admittedly novel question that would raise issues of first impression for the courts. However, I am highly skeptical of the legality of this approach, particularly under the "one-man, one-vote" doctrine established in *Wesberry v. Sanders*.[50]

This is a question that leads to some fairly metaphysical notions of overlapping representation and citizens with 1.4 representational status. On one level, the addition of an at-large seat would seem to benefit all Utah citizens equally since they would vote for two members. Given the deference to Congress under the "necessary and proper" clause, an obvious argument could be made that it does not contravene the "one person, one vote" standard. Moreover, in *Department of Commerce v. Montana*, 503 U.S. 442 (1992), the Court upheld the method of apportionment that yielded a 40% differential off of the "ideal." Thus, a good-faith effort of

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to imagine an alternative to saying "two Senators from each State." It is rather awkward to say "two Senators from each of the several states."

[50] 376 U.S. 1 (1964).

apportionment will be given a degree of deference and a frank understanding of the practical limitations of apportionment.

However, there are various reasons a federal court might have cause to strike down this portion of H.R. 5388. Notably, this at-large district would be roughly 250% larger than the ideal district in the last 2000 census (2,236,714 v. 645, 632). In addition, citizens would have two members serving their interests in Utah -- creating the appearance of a "preferred class of voters."[51] On its face, it raises serious questions of equality among voters:

> To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected 'by the People."[52]

This massive size and duplicative character of the Utah district draws obvious points of challenge.[53]

First, while the Supreme Court has not clearly addressed the interstate implications of "one person, one vote," this bill would likely force it to do so.[54] Awarding two representatives to each resident of Utah creates an obvious imbalance vis-à-vis other states. House members are expected to be advocates for this insular constituency. Here, residents of one state could look to two representatives to do their bidding while other citizens would limited to one. Given racial and cultural demographic differences between

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[51] *Reynolds v. Sims*, 377 U.S. 533, 558 (1964) ("The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications . . . The conception of political equality . . . can mean only one thing – one person, one vote.").

[52] *See Wesberry*, 376 U.S. at 7-8.

[53] *Cf.* Jamie B. Raskin, *Is This America? The District of Columbia and the Right to Vote*, 34 Harv. C.R.-C.L. L. Rev. 39 (1999) (discussing "one person, one vote" precedent vis-à-vis the District).

[54] *But see Department of Commerce*, 503 U.S. at 463 ("although 'common sense' supports a test requiring 'a goodfaith effort to achieve precise mathematical equality' within each state, *Kirkpatrick v. Preisler*, 394 U.S. at 530-531, the constraints imposed by Article I, § 2, itself make that goal illusory for the Nation as a whole.").

Utah and other states, this could be challenged as diluting the power of minority groups in Congress.

Second, while interstate groups could challenge the disproportionate representation for Utah citizens, the at-large seat could also be challenged by some intrastate groups as diluting their specific voting power. If Utah simply added an additional congressional district, the ratio of citizens to members would be reduced. The additional member would represent a defined group of people who have unique geographical and potentially racial or political characteristics.[55] However, by making the seat at large, these citizens would now have to share two members with a much larger and more diffuse group – particularly in the constituency of the at-large member. It is likely that the member who is elected at large would be different from one who would have to run in a particular district from the more liberal and diverse Salt Lake City.

Third, this approach would be used by a future majority of Congress to manipulate voting in Congress and to reduce representation for insular groups.[56] Rather than creating a new district that may lean toward one party or have increased representation of one racial or religious group, Congress could use at-large seats under the theory of this legislation. Moreover, Congress could create new forms of represented districts for overseas Americans or for federal enclaves.[57] The result would be to place Congress on a slippery slope where endangered majorities tweak representational divisions for their own advantage.

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[55] *See Davis v. Bandemer*, 478 U.S. 109, 133 (1986) (reviewing claims of vote dilution for equal protection violations "where the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively.").

[56] At one time, at-large district existed but this practice largely ended after the Supreme Court handed down *Wesberry*. Federal law also contains barriers to such at large districts. 2 U.S.C. § 2c.

[57] Notably, rather than try to create representatives for overseas Americans as some nations do, Congress enacted a law that allows citizens to use their former state residence to vote if the state complies with the requirements of the Uniformed and Overseas Citizens Absentee Voting Act. 42 U.S.C. §1973ff.

Finally, while it is difficult to predict how this plan would fare under a legal challenge, it is certain to be challenged. This creates the likelihood of Congress having at least one member (or two members if you count the District representative) who would continue to vote under a considerable cloud of questioned legitimacy. In close votes, this could produce great uncertainty as to the finality or legitimacy of federal legislation. This is entirely unnecessary. If a new representative is required, it is better to establish a fourth district not just a fourth at-large representative for legal and policy reasons.

V.
THE MODIFIED RETROCESSION PLAN: A THREE-PHASE ALTERNATIVE FOR THE FULL REPRESENTATION OF CURRENT DISTRICT RESIDENTS IN BOTH THE HOUSE AND THE SENATE

In some ways, it was inevitable (as foreseen by Alexander Hamilton) that the Capitol City would grow to a size and sophistication that representation in Congress became a well-founded demand. Ironically, the complete bar to representation in Congress was viewed as necessary because any half-way measure would only lead to eventual demands for statehood. For example James Holland of North Carolina noted that only retrocession would work since anything short of that would be a flawed territorial form of government:

> If you give them a Territorial government they will be discontented with it, and you cannot take from them the privilege you have given. You must progress. You cannot disenfranchise them. The next step will be a request to be admitted as a member of the Union, and, if you pursue the practice relative to territories, you must, so soon as they numbers will authorize it, admit them into the Union. Is it proper or politic to add to the influence of the people of the seat of Government by giving a representative in this House and a representation in the Senate equal to the greatest State in the Union? In my conception it would be unjust and impolitic.[58]

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[58] Mark Richards, Presentation before the Arlington Historical Society, May 9, 2002 (citing Congressional Record, 1805: 979-980) (quoting Rep. James Holland of North Carolina).

We are hopefully in the final chapter of this debate. One hundred and sixty years ago, Congress retroceded land back to Virginia under its Article I authority. Retrocession has always been the most direct way of securing a resumption of voting rights for District residents. Most of the District can be simply returned from whence it came: the state of Maryland. The greatest barrier to retrocession has always been more symbolic rather than legal. Replacing Washington, DC with Washington, MD is a conceptual leap that many are simply not willing to make. However, it is the most logical resolution of this problem.[59]

For a number of years, I have advocated the reduction of the District of Columbia to the small area that runs from the Capitol to the Lincoln Memorial. The only residents in this space would be the First Family. The remainder of the current District would then be retroceded to Maryland.

However, I have also proposed a three-phase process for retrocession. In the first phase, a political transfer would occur immediately with the District securing a House seat as a Maryland district and residents voting in Maryland statewide elections. In the second phase, incorporation of public services from education to prisons to law enforcement would occur. In the third phase, any tax and revenue incorporation would occur.

These phases would occur over many years with only the first phase occurring immediately upon retrocession. Indeed, I recommend the creation of a three-commissioner body like the one that worked with George Washington in the establishment of the original federal district. These commissioners would recommend and oversee the incorporation process. Moreover, Maryland can agree to continue to treat the District as a special

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[59] At first blush, there would seem to be a promising approach found in legislation granting Native Americans the right to vote in the state in which their respective reservation is located. 8 U.S.C. § 1401(a)(2). After all, these areas fall under congressional authority in the provision: Section 8 of Article I. However, the District presents the dilemma of being intentionally created as a unique non-state entity – severed from Maryland. For this approach to work, the District would still have to be returned to Maryland while retaining the status of a federal enclave. *See also Evans v. Cornman*, 398 U.S. 419 (1970) (holding that residents on the campus of the National Institutes of Health (NIH) in Maryland could vote as part of that state's elections).

tax or governing zone until incorporation is completed. Indeed, Maryland may chose to allow the District to continue in a special status due to its historical position. The fact is that any incorporation is made easier, not more difficult, by the District's historic independence. Like most cities, it would continue to have its own law enforcement and local governing authority. However, it could also benefit from incorporation into Maryland's respected educational system and other statewide programs related to prisons and other public needs.

In my view, this approach would be unassailable on a legal level and highly efficient on a practical level. I realize that there remains a fixation with the special status of the city, but much of this status would remain. While the city would not technically be the seat of government, it would obviously remain for all practical purposes our Capitol City.

This is not to suggest that a retrocession would be without complexity. Indeed, the Twenty-Third Amendment represents an obvious anomaly. Section one of that amendment states:

> The District constituting the seat of government of the United States shall appoint in such manner as the Congress may direct:
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> A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a state, but in no event more than the least populous state; they shall be in addition to those appointed by the states, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a state; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.[60]

Since the only likely residents would be the first family, this presents something of a problem. There are a couple of obvious solutions. One would be to repeal the amendment, which is the most straight-forward and preferrred.[61] Another approach would be to leave the amendment as constructively repealed. Most presidents vote in their home states. A

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[60] U.S. Const. amend. XXIII.

[61] Frankly, my preference would be to repeal the entire Electoral College as an archaic and unnecessary institution and move to direct election of our president. But that is a debate for another day.

federal law bar residences in the new District of Columbia. A third and related approach would be to allow the clause to remain dormant since it states that electors are to be appointed "as the Congress may direct."[62] The only concern is that a future majority could do mischief by directing an appointment when electoral votes are close.

VI.
CONCLUSION

In closing, I wish to commend this Subcommittee for agreeing to hear from both advocates and opponents to this bill. Regardless of what proposal is adopted, I strongly encourage you not to move forward with H.R. 5388. It is an approach that achieves less representation than is deserved for the District by means that asserts more power than is held by the Congress. Moreover, the outcome of this legislation, even if sustained on appeal, would not be cause for celebration. Indeed, H.R. 5388 would replace one grotesque constitutional curiosity in the current status of the District with another new curiosity. The creation a single vote in the House (with no representation in the Senate) would form a type of half-formed citizens with partial representation derived from residence in a non-state. It is an idea that is clearly put forward with the best of motivations but one that is shaped by political convenience rather than constitutional principle.

It is certainly time to right this historical wrong, but, in our constitutional system, it is often more important how we do something than what we do. This is the wrong means to a worthy end. However, it is not the only means and I encourage the Members to direct these considerable energies toward a more lasting and complete resolution of the status of the District of Columbia in Congress.

Thank you again for the honor of speaking with you today and I would be happy to answer any questions that you might have. I would also be happy to respond to any questions that Members may have after the hearing on the constitutionality of this legislation or the alternatives available in securing full voting rights for District residents.

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[62] *See generally* Peter Raven-Hansen, *The Constitutionality of D.C. Statehood*, 60 Geo. Wash. L. Rev. 160, 187-88 (1991); Philip G. Schrag, *The Future of District of Columbia Home Rule*, 39 Cath. U.L. Rev. 311, 317 (1990).

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